84-1057

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

OPHUS A. HUTCHERSON, JR.
W. H. HOUSEMAN
A. W. LYNCH
BRUCE HIGGINS
O. K. TENCH
KENNETH D. CAMPBELL
ALLEN PERDUE
JAMES BOUSEMAN
JACKSON JEWELL
J. CARL POINDEXTER

and

A. DALE BROWN
RICHARD O. ANGLE
HAROLD E. PALMER
PAUL SMITH
JOSEPH FORDHAM
ROGER FLOWERS
DICK ROBERTSON

Petitioners,

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA:
TOWN OF ROCKY MOUNT, VIRGINIA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

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QUESTIONS PRESENTED

1. There being no unambiguous Virginia remedial law or apposite court precedent pursuant to which the class plaintiffs may seek, by state court mandate, the uniform assessment and collection of a Franklin County school-financing tax from which a substantial segment of the plantiffs' class of benefited taxpayers are exempted by state law, did the District and the Appeals Courts below erroneously deny District Court jurisdiction over plaintiffs' grievance on the assigned ground that they have a "plain, speedy and efficient remedy in the courts of the State"?

2. In relying on the rulings of the Fifth Circuit Court of Appeals upholding district court jurisdiction over civil rights (#42 U.S.C. 1983) suits to mandate the "assessment, levy or collection" of certain state taxes characterized by disuniform, inequitable and

constitutionally objectionable exemptions (i.e., the opposite of suits to "enjoin, restrain, or suspend the assessment levy or collection" of such taxes), were the plaintiffs herein guilty nonetheless of filing a "frivolous" suit in the Fourth Circuit merely because they asked the District Court therein to hear and remedy precisely the same kind of complaint upheld by the courts of the Fifth Circuit?

3. The plaintiffs' suit having been dismissed for lack of jurisdiction of the District Court and also, for this reason alone, pronounced by the Court to be "frivolous", in the teeth of the Fifth Circuit's rulings to the contrary import and upon which the plaintiffs relied, are the governmental defendants herein nonetheless "entitled" to exact their defense counsels' fees ($5,511) from not their licensed professional lawyer-"officer of the court" but instead from the bona fide plaintiffs in this "private attorneys general"type of class action suit?

4. Has not Congress exceeded its federal constitutional authority in enacting The Civil Rights Attorney's Fees Awards Act (42 USS.C 1988) in so far as it purports to confer the "chilling" repressive governmental power on municipalities of Virginia -- a power denied to them by the state's own constitution and laws -- to exact damages in the guise of their defense attorneys' wages and fees from their bona fide civil rights complainants herein merely because their lawyer mistakenly filed their civil rights suit in the United States District Court of the Fourth Circuit instead of a state court therein?

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported as Ophus A. Hutcherson, Jr. et al, v. Board of Supervisors of Franklin County, Virginia, et al, No. 82-2109 (4th Cir. August 23, 1984), and is set out in the Appendix at A-2. The Fourth Circuit's denial of the petitioners' motion for rehearing was issued on October 1, 1984, and is duplicated in the Appendix at A-13.

The Order of the District Court for the Western District of Virginia dismissing plaintiffs' complaint on the assigned ground of lack of jurisdiction was entered on November 29, 1982, and is replicated in the Appendix at page A-27. The Memorandum Opinion and Order of the Court taxing the defendants' attorneys' fees to the plaintiffs was entered on January 10, 1983, and is set out in the Appendix at page A-15.

The District Court's denial of plaintiffs' Motion for Reconsideration of the Court's Order of January 10, 1983 awarding attorneys' fees is replicated in the Appendix at page A-21.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal is based on the First, Fifth, Tenth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. 1983. Other statutes involved are U.S.C. 1341, 42 U.S.C. 1988, 58-617.2 and 58-1145 of the Code of Virginia of 1950 as amended.

The jurisdiction of the District Court for the Western District of Virginia was invoked pursuant to 28 U.S.C. 1331.

The relevant provisions of these amendments and statutory provisions are set forth in the Appendix beginning at page A-29.

I. STATEMENT OF THE CASE

To pay for a substantial boost of county teachers' salaries. the Franklin County Board of Supervisors adopted a 20% utility tax, July 1980, effective August 1, 1980, as authorized by state law which inter alia, in

#56.617.2 of the Code of Virginia, provides that:

> Any county (utility) tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or hereafter imposes a town tax on consumers of utility services ..., provided that such town (1) provides police or fire protection, and water or sewer services ...

The defendant Town of Rocky Mount, having adopted a 10% utility tax some time previously, the town's residential beneficiaries of the county's schools are exempt from the duty to pay the county's 20% school-financing utility tax, in accordance with the provision of the state statute quoted above.

Plaintiffs filed their class action petition for declaratory judgment and injunctive relief in the United States District Court at Roanoke on May 25, 1982, naming the Board of Supervisors of Franklin County and the Town of Rocky Mount, Virginia, as defendants. The Plaintiffs asked for declaratory judgment that #58-617.2 of the Code of Virginia

is unconstitutional in that it authorizes the exemption of the residents of the town from the duty to pay the utility tax levied by the county to finance a substantial boost of the salaries of the teachers of the county's schools used in common by both town and non-town citizens of the county.

They asked that the court order the extension of the county's utility tax to and the collection of it from the inhabitants of the town on the same basis as it applies to the inhabitants of the county at large (plaintiffs' class) or abate or remove the tax as then applied.

On June 10, 1982, and June 14, 1982, the defendants, town and board of supervisors, moved the court to dismiss on the ground that the Tax Injunction Act, 28 U.S.C. 1341, precluded the court's jurisdiction over plaintiffs' grievance.

On July 29, plaintiffs moved the court for leave to amend; leave was granted, and

plaintiffs filed their Amended Petition for Declaratory Judgment, Damages and Injunctive Relief. Hearing on the defendants' motions to dismiss was set for and held on September 29, 1982.

In their amended petition, the plaintiffs dropped their original prayer that the county utility tax be abated or removed if it not be extended to the county citizens resident in the defendant town, and they added their claim for compensatory damages, plus 100% more in punitive damages from the county board of supervisors, for trespasses on the civil rights of the plaintiffs. After the filing of memoranda of law by the parties, the court, on November 3, 1982, issued its order dismissing plaintiffs' complaint. (Duplicated in the Appendix at page A-27.

Thereupon the defendants filed motions based on #42 U.S.C. 1988, for award of attorneys' fees at the plaintiffs' expense.

After the parties filed memoranda of law on this issue, the court entered its Memorandum Opinion and Order on January 10, 1983, "finding" "as a matter of fact and law that the plaintiffs' action was frivolous." The court said:

> Any fair reading of the statute (28 U.S.C. 1314) and the Supreme Court cases interpreting it clearly instructs that a United States District Court may not entertain an action which in any way challenges the state's levying and collecting of taxes where the state provides a speedy and efficient procedure for challenging such actions. Virginia clearly provides such a procedure. Accordingly, I find that the Defendants are entitled to attorneys' fees ..." at plaintiffs' expense. Appendix page A-17.

From the District Court's Memorandum Opinion and Order, the plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit, from whose adverse ruling of October 1, 1984, they hereby appeal to this Court.

II. REASONS FOR GRANTING CERTIORARI

The District Court erred in dismissing plaintiffs' complaint on the assigned ground that the Tax Anti-Injunction Act bars the Court's jurisdiction over plaintiffs' cause of action.

The Tax Injunction Act, 28 U.S.C. 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. (emphasis added)

Contrary to the defendants' claim, plaintiffs are not asking the Court to "enjoin, suspend or restrain" the assessment or collection of any tax. Quite the contrary, they are asking the court to order the assessment and collection of a tax, i.e., Franklin County's school-supporting utility tax uniformly from all taxable county beneficiaries of the county's public schools in redress of the discriminatorily disuniform, unequal and

"invidious" burden now imposed on plaintiffs' class of county taxpayers vis-a-vis those of the Town of Rocky Mount who are exempted from the county's school-supporting utility tax under Virginia Code Section 58-617.2, cit. supra.

No case has been cited upholding the reverse interpretation of #1341 as espoused by the courts below in this case. The reason is that nowhere in any federal court case, with facts like those in this plaintiffs' case, is there to be found any such reverse interpretation as that given to #1341 by the defendants and the courts in this case.

In categorical contradiction of the defendants' and the lower courts' interpretation of #1341, several cases have been decided in the Fifth Circuit which pointedly uphold plaintiffs' interpretation:

> It has long been established by the Fifth Circuit, however, that #1341

> does not apply to suits wherein the requested remedy is the collection of additional taxes and not the enjoining or suspension of taxes. See Hargrave v. McKinney, 413 F 2d 320 (f Cir. 1969; Bland v. McMann, 463 F. 2d 21 5 Cir. 1972); Appling County v. Municipal Electric Authority of Georgia, 621 F 2d 1301, 1304 (5 Cir. 1980). Since plaintiffs demand that taxes be collected and not enjoined, it is quite clear that #1341 does not operate to bar this action." Moten, et al v. A. C. Lambert et al. 508 F Supp 367 (1981).

Plaintiffs find no apposite authority or reason why the Fifth Circuit's interpretation of #1341, as summed up in Moten, supra, should not be presumed to be the relevant jurisdictional law of the land until the Supreme Court at some future time perchance overrules the Fifth Circuit in a case presenting the same issues of fact and law presented in Moten, and likewise in this case of the plaintiffs.

The justification articulated by the Supreme Court for "drastically" restricting

the jurisdiction of the district courts over state tax suits under #1341 rests on concern for the adequacy and reliability of the tax revenues essential to the efficient administration of the public functions of the states and their localities. Plaintiffs assert no objection to this rationale of the limitation on the district court's jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection" of taxes pursuant to #1341, simply because plaintiffs are not seeking any such impairment or derogation of the revenues of the governmental defendants. On the contrary, the positive nature of the injunctive relief being sought by the plaintiffs is actually such that it would, if granted, substantially expand and enhance the tax revenues of the county, the party and the only party against which plaintiffs seek an injunctive remedy. Therefore, there being no incompatibility between due solicitude for the security of the county's revenues,

the damage and the injunctive redress sought by the plaintiffs against the damaging unequal protection of the laws as they bear upon the plaintiffs, the provisions of #1983 and even #1341 require that the court exercise its jurisdiction over and hear the complaint of the plaintiffs on its merits.

Clearly and cogently supporting this conclusion is the pointedly pertinent case of Fulton Market Cold Storage v. Cullerton, 582 F 2d 1071, 1078 (1978):

> ... since it (plaintiff Fulton) seeks damages for the wrongful conduct of officials, Fulton argues that #1341 or its underlying policy considerations are inapplicable. Furthermore, Fulton contends that the purpose of #1983 suits would be thwarted if #1341 were construed to bar damage actions as well.
>
> This court agrees with the plaintiff's argument. As has been demonstrated, #1341 is directed at prohibited equitable relief. The statute, its legislative history and significant cases indicate that the primary evil to be avoided is federal equitable relief which would disrupt the state taxing process. A federal court injunction

> or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federal system of government.
>
> These concerns are not present in a suit for damages. In the present case the plaintiff is not seeking to enjoin any taxing process. Nor will a judgment for the plaintiff have that effect. Fulton is seeking damages for the alleged wrongful and intentional conduct of certain officials who allegedly deprived Fulton of constitutional rights while acting under color of state law.

Plaintiffs do not have "a plain, speedy and efficient remedy in the Courts of the State."

The language of the Tax Injunction Act, buttressed by the personal civil rights guarantees of the Constitution, contemplate that the plaintiffs are entitled to be heard by the District Court where the remedy for their grievance in the courts of the state is not "plain" and "efficient." Plaintiffs maintain that no plain and efficient remedy is provided in Virginia's courts as follows.

The courts below, espousing the claims of the defendants, hold that the plaintiffs' right of action in the District Court is barred by recent decision of this Court in Rosewell v. LaSalle National Band, 430 U.S. 503, 67 L. Es. 2d 464, 101 S. Ct. 1221 (1981); Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 1. Ed. 2d 271, 102 S. Ct. 177 (1982); and California v. Grace Brethren Church, 457 U.S. 393, 73 L. Ed. 93, 102 S. Ct. 2498 (1982). However, all of these cases had as their objective "... to enjoin, suspend, or restrain the assessment, levy or collection of ... State taxes" in respect to which there was little, if any, basis for a claim that the laws and courts of the states involved failed to afford "plain, speedy and efficient ..." remedies as contemplated in #28 U.S.C. 1341, in complete antithesis of the requirement for and the availability of a plain and efficient remedy for the inequit-

able non-assessment and non-collection of taxes uniformly.

The courts below maintain that Virginia's Erroneous Assessment tax law (#58-1145, Code of Virginia) provides appellants a plain and efficient remedy. That statute reads in part as follows:

> In such proceeding (to correct an erroneous assessment) the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal ... (underscoring added)

Concerning the nature and purpose of this statute, the Virginia Supreme Court has held that "... assessment means the amount of the tax imposed, and, in the second sentence, the evaluation of the property."

Obviously this statute and the court's own interpretation of it rule out any plain reliability on it for a state court mandate that Franklin County's school-financing utility tax be extended to the tax-exempted benefic-

iaries of the county's school system residing in the defendant Town of Rocky Mount. City of Alexander v. R.F. & P., 223 Va. 293.

Alternatively, in its Opinion the Appeals Court conjectures that the Virginia Supreme Court decisions in Commonwealth v. Tredegar Co., 122 Va. 506, 95 S.E. 279 (1918), and City of Staunton v. Mary Baldwin Seminary, 39 S.E. 596 (Va. 1901), imply that equitable relief would be available thereunder, despite the fact that individual taxpayers in those cases were simply seeking to enjoin, restrain or suspend the assessment and collection of their property taxes -- not to obtain the class-wide extension and collection of a non-property tax such as the excise tax involved in the plaintiffs' case herein. Corroborative of this is the fact that no other kind of tax-challenging suit has ever been brought thereunder in Virginia.

Under these circumstances, persons familiar with Virginia procedural law know that,

if the appellants were to seek the extension of Franklin County's school-supporting utility tax to the exempted school-using class of town taxpayers in the county, a demurrer would almost certainly be filed by the defendant local governments. And, in turn, it would very probably happen that the appellants herein would have to petition the Virginia Supreme Court in hope of obtaining a reversal of the circuit court's ruling sustaining the defendants' demurrer. Therefore any reasonable interpretation of the federal statute providing, in effect, that appellants have a right to have their grievance heard by the District Court because the state's laws do not provide "a plain, speedy and efficient remedy" for them, reasonably requires that this Court reverse the "finding" of the District Court.

This Court has held that where the achievement of tax equity among various taxpayers within a jurisdiction requires an increase

in the taxes of the favored class of tax-payers:

> The constitutional requirement however is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. Township of Hillsborough v. Doris Duke Cromwell, 326 U.S. 620-30, 90 L Ed 358-67.

This being precisely the burden resting on appellants, the above holding of the Supreme Court confirms appellants' right to have their tax grievance adjudicated by the United States District Court. Even the Fourth Circuit Court of Appeals has recently cited with approval the case above quoted in Strescon Industries v. Cohen, 664 F 2d 929, 951, 4th cir., 1981.

The intent of Congress in enacting the Tax Injunction Act was not to deny civil rights complainants of their right to invoke federal court jurisdiction over their grievances except where they genuinely and plainly

have a "plain, speedy and efficient" state remedy -- and not a speculative or imprecise remedy procedurally, and quixotic substantively. And even if it were the congressional intent to limit the constitutional rights of tax complainants to access to the federal courts, it should never be forgotten that the Congress, and even the federal courts, lack the legitimate authority to nullify the rights vouchsafed to citizens by the 1st, 5th and the 14th amendments of the United States Constitution involved in this case.

In their eagerness to curtail the volume of cases there appears to be an undue tendency of the federal courts to disallow the right of citizens to have their meritorious grievances heard by them, by too easily "finding" that the district courts lack jurisdiction, etc. There is reason for appellants to fear that thereby their rights have been short-circuited in this case.

It has long been established in the federal courts that, upon motions to dismiss for alleged want of jurisdiction, the complainants' statements of facts are to be taken as true and correct. Notwithstanding this fact, the Appeals Court's opinion gratituously intrudes into and prejudically expresses judgment on the merits of appellants' complaint improperly, and worse by incorrectly stating the true facts as pleaded by the appellants concerning the nature of their tax complaint and the relief they seek. The Court says:

> We think the suggestion that the federal Constitution requires the town (of Rocky Mount) to earmark its utility tax for school purposes, when this is not required by state law, is simply "frivolous." Appendix, page A-5, fn.

It would be frivolous if appellants had made such a "suggestion". But they have made no such suggestion whatsoever. On the contrary, the relief they seek is the district court's mandate that town residents

must pay the county's school-financing utility tax on the same basis as the rest of the county's school users and taxpayers. (What the town does with the proceeds of its own utility or other taxes is the town's business of course.)

As for the issue raised, not by the defendant town and county but only by the Appeals Court (and contrary to federal rules of procedure) that the utility tax was not "earmarked" for school-supporting purposes, IT WAS NOTORIOUS AND RECOGNIZED BY ALL INTERESTED PARTIES AND NOT DISPUTED BY THE TOWN AND COUNTY IN THIS CASE THAT THE TAX WAS INDEED ADOPTED FOR THE PARTICULAR PURPOSE OF PAYING FOR AN INCREASE IN THE COUNTY SCHOOL TEACHERS' SALARIES, AND THIS THE APPELLANTS CAN PROVE.

No taxes in the state are earmarked for particular purposes. Nevertheless it is commonplace and perfectly proper for accurate budget computations to be made and applied to

the question of what additional tax levy is required and to be used to meet a particular additional cost of an additional governmental undertaking. This is precisely what occurred in respect to Franklin County's utility tax when it was being considered, debated and adopted. In any case approximately 80% of the county government costs are for the county schools. So there is no disputing the nature, the amount and the purpose of the utility tax of Franklin County.

Under the law, if Rocky Mount had a one-half of one percent utility tax of its own when the county adopted its 20% utility tax, or if thereafter the town adopted such a tax, it would defeat the county's right to collect its 20% school-supporting utility tax from the town inhabitants who equally are served by the county's public schools. Mirabile dictu, under the logic of the Court's claim that no constitutional wrong is involved in this inequitable tax dispensation, it would

be quite legitimate (constitutional) for the state law to exempt all Virginia town residents from all Virginia county taxes while the town residents fully and equally enjoy the benefits of the county schools!

It must be concluded that the lower courts have simply failed to reason through the constitutionally sinister implications of state-law exemption of town residents of a county from county taxes most of which are necessarily allocated to support of the county schools.

III. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT MISCONSTRUED AND MISAPPEALED BY THE LOWER COURTS

> ...To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate

> after it clearly became so ... Christiansburg Garment Co. v. EEOC, 434 U.S. 112, 54 L Ed 2d 648.

It is quite evident that it was not within the contemplation of the Supreme Court that, merely because a district court "finds" that it lacks jurisdiction over a civil rights claim asserted by bona fide complainants that therefore they should be ordered to pay the "prevailing" defendant's attorney's fees. And it must be inferred that it was never even imagined by the Court that state governmental defendants who "prevail" are to be awarded their defense counsel's fees where the court "finds" that it lacks jurisdiction over the subject matter of the suit.

Even more relevantly, the Court added:

> In applying these criteria (of what is a frivolous case), it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can

> a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. Id. at 657.

On the basis of these dicta alone by the Supreme Court, the district court and the Appeals Court panel have acted quite unjustly in approving assessments of the governmental defendants' lawyers' wages against the bona fide complainants in the circumstances of this case.

Before the enactment of the Civil Rights Attorney's Fees Awards Act by Congress (1976), the bona fide civil rights complainants herein could not have been subject to an assessment of attorneys' fees of the "prevailing" defendants as has befallen the plaintiffs herein because there was no color of authority then

for such defendants to demand recovery of such fees under "the American Rule." Certainly it is a fact that the circumstances and the history of the Civil Rights Fees Awards Act show that it was the intent of Congress thereby to assist and facilitate--NOT ERECT A "CHILLING" DETERRANT -- to the vigorous "private enforcement" of the civil rights laws. This is demonstrated by the following excerpts from the debate of the Fee Awards Act by Congress:

> This bill creates no startling new remedies -- it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's (Alyeska) decision. (Emphasis in the original text) Senate Report 94-1011, 1976.

Senator Edward Kennedy, Senate floor leader of the bill, commented as follows:

> The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends sub-

> stance to the private enforcement of rights already authorized under existing civil rights. Furthermore, the bill does not create any new burdens for the courts. Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they have been allowing prior to the Alyeska decision.

In the House debate on the bill, the following comments were made:

> It is clearly not the intent of Congress to create a new remedy. (Representative Railsback, 122 Cong. Rec. 35117).
>
> The Alyeska decision ended that practice (awarding plaintiffs' attorney fees) which this bill seeks to restore. (Rep. Drinan Id. 35122).
>
> This bill restores to the courts authority which they had exercised for years under the private attorneys general concept. Id. at 35126, comment by Representative Fish.
>
> This is a first step ... it does not overturn law or practice, except the Alyeska case. (Comment by Representative Kastenmeier, Id. at 35126.)

In defiance of the congressional intent and the constitutional objections, the lower federal courts, in this and a few other cases,

have assessed state governmental defendants' attorneys' fees against civil rights plaintiffs on the frivolous ground that a finding by the courts that they lack jurisdiction entitles the prevailing governmental defendants to be recompensed of their attorney charges and/or salaries at the expense of the plaintiffs. This Court assuredly should reverse the assessment of this oppressive punishment against the appellants for the plethora of reasons herein set forth.

IV. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT AS APPLIED RAISES A QUESTION OF ITS CONSTITUTIONALITY

1. This Act, designed to further the private enforcement of civil rights, may not be construed to authorize assessments of governmental defendants' attorney fees at the expense of bona fide citizen plaintiffs without drawing into question the constitutionality of the Act in this respect.

The Act, 42 U.S.C. 1988, provides that:

> In any action or proceeding to enforce a provision of ... 42 U.S.C. 1983 ... The court may, in its discretion, allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

The one civil right prerequisite to all other rights is the right of aggrieved citizens to seek court enforcement of their rights without risk that, if the governmental defendant turns out to be the "prevailing party", they can not be subjected to counter attack and reprisals at the hands of the government. That is to say, without the right to seek enforcement of one's rights in the courts, one has no rights. Needless to add, if citizens are subject to liability to pay the governmental defendants' super-size lawyers' fees, if their challenge to the validity of state law or action is rebuffed by the courts, their constitutional rights, purportedly secured by the 1st, 5th and 14th amendments, no longer exist.

The fallacy of court awards of attorney fees to successful state defendants is based on the implicit but totally fallacious assumption that the state has the same civil rights against the citizens as they have against the state in court challenges to the constitutionality of state law or action.

Only persons have civil (constitutional) rights. The state has none. And the state's cost of its defense counsel must be accepted as a necessary and proper operating expense of maintaining a society free of arbitrary and tyrannical oppression. This right and benefit of a free society have been secured heretofore by our federal courts via their enforcement of the freedoms guaranteed by the 1st, 5th and 14th amendments of the Constitution. But now, in the case of the appellants, the courts below have denied the appellants the right guaranteed by the 1st amendment peaceably "... to petition the Government for redress of grievances" without subjection to

reprisals, denial of due process, property, etc. In the context of the facts of this case, the role of our courts amounts to a monstrous travesty on justice and the Bill of Rights, making it necessary that this Court vindicate the civil rights of the appellants by reversing the rulings of the courts below.

2. Virginia law does not authorize the state (including, of course, its governmental subdivisions) to recover the salaries or fees of its defense counsel in cases in which citizens attack the validity of state law or action. In short, throughout the history of the Commonwealth of Virginia its citizens have enjoyed state constitutional and common law immunity from claims of the state for recovery of its attorneys' fees (damages as the Attorney General of Virginia calls them. Brief of the Attorney General in Pulliam v. Allen et al., 1045 Sup. Ct. 1970, 80 L. Ed. 2d 565).

Being ineligible under Virginia law, to exact such damages from the appellants, the courts ought not to assume that the state defendants are "entitled" to recover attorney fees from the appellants merely because they are the "prevailing parties". Rather, the courts should ascertain and apply the state law in accordance with the landmark Rule of Decision promulgated by the Supreme Court in Erie Railway Co. v. Thompkins and its progeny. 304 U.S. 64, 58 S CT 817, 82 L Ed 1188 (1938).

Instead of doing this, the courts below have presumed (without examining the question) that Congress conferred the authority on the federal courts to confer the authority on the state to assess damages (attorney fees) against civil rights plaintiffs (appellants) where the state is found to be the "prevailing party", per #1988, regardless of the fact that the state's own laws afford immunity of its citizens from such oppressive claims of the state against them. Not only is the posi-

tion of the courts in this matter violative of the Rule of Decision (Thompkins); it is flagrantly violative of the federal courts' own doctrine of comity which holds that, instead of intruding into and disregarding state law, the federal courts should defer to and honor the laws and processes of the state!

By what legal logic can the federal courts justify this usurpation?

3. In the recently-decided landmark case of Pulliam v. Allen, cit. sup., it appears that, by necessary implication, the Supreme Court has overruled the judgment of the District Court and the Appeals Court judgment that appellants are legally and justly obligated to pay the state's attorney fees ordered by the District Court.

In Pulliam, the Supreme Court imposed conformity by the state with its own law affording immunity of Allen from incarceration where state law did not authorize it in connection with his offense (misdemeanor).

If Virginia's lack of its own legal authority to jail Allen when he was unable to post bail, made Judge Pulliam's incarceration of him impermissibly abusive of his civil rights, entitling him to sue and to obtain an injunction and his attorney's fees (de facto damages) against Judge Pulliam, it is only reasonable that this Court must likewise conclude that the state's lack of state-law authority to claim attorneys' fees (the "functional equivalent of damages"according to the state's attorney general) from appellants likewise entitles them to immunity from this oppressive claim of the state.

Since the Supreme Court's enunciation of Rule of Decision in Thompkins, cit. sup., it has been incumbent on the federal courts to ascertain and apply the local (state) law where there is a conflict of laws, so as to make the outcome of litigation in federal courts conform to the outcome which would have occurred in the state courts, except

where such an approach would result in a violation of a paramount federal law. The rationale of this basic rule is ignored by the federal courts in respect to the emergent issue of whether "prevailing" state defendants in civil rights cases are subject to the sanctions of the state's own law as well as the provisions of the Bill of Rights of the United States Constitution.

Again, in the light of Thompkins, and the doctrine of comity, how can the presumption be countenanced that the Civil Rights Attorney's Fees Awards Act abrogated state-law denial of the state's authority to claim attorney's fees from unsuccessful civil rights plaintiffs?

The opinion of the lower courts, while invoking the old shibboleth of "comity" to justify refusal to uphold plaintiffs' right to have their complaint heard by the district court, is ignoring -- indeed violating -- comity by not ascertaining what the state law

is and deferring to it in respect to the state's attorneys' fees claims against the appellants, not authorized by the law of the state.

Appellants are advised, believe and maintain that the state governmental defendants' asserted claim to de facto damages (attorneys' fees) from appellants is violative of their right of immunity from such claim fixed by the law of the state, and that, even disregarding the doctrine of comity, the state law is paramount over any federal statute or court ruling purporting to abrogate such state law which right is secured to the appellants by the 10th and 14th amendments of the United States Constitution.

In the teeth of the foregoing, the state defendants callously and recklessly asserted the unauthorized right to claim the damages in question, in violation of appellants' rights secured by Virginia's Bill of Rights and the state's common law.

The Constitution of Virginia provides that:

> All power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them, and
>
> That all power of suspending laws by any authority, without consent of the people, is injurious to their rights, and aught not to be exercised and that they have the right ... to petition the government for a redress of grievances.

The conclusion is inescapable that the demand of the state defendants (respondents) for damages (attorney's fees) at the expense of the bona fide plaintiffs is, per se, an arrogant act of contempt for the above quoted constitutional and common law limitations on the state's authority to inflict reprisals upon citizens who unsuccessfully attack the constitutionality of discriminatory state law.

4. If it were constitutionally permissible for state governmental defendants to recover damages (attorney's fees) from their unsuccessful civil rights complainants against

constitutionally questionable state laws, all logic, rational law and civilized morality dictate that the complainants' lawyers ("officers of the court" and legal experts) -- not the legally uneducated clients -- should be required to pay the damage award to the state, if anybody is to be subjected to this "chilling" responsibility.

The layman, being untrained in the subtlies of the law, is of course incompetent to make informed judgments on such technical questions as to whether the court may lack jurisdiction or whether their complaint is legally "without foundation, groundless, and frivolous." Even for learned lawyers such judgments may well be speculative in nature, because the relevant criteria are inherently imprecise in application. Therefore holding the lawyers' clients, instead of their legally expert lawyers, to be the wrongdoers responsible for the attorneys' fees of the governmental defendants is about as rational and just as

holding unwell patients responsible to their doctors for telling them what is medically wrong with them, on pain of severe penalty if they fail to do so correctly. Indeed such "justice" is so alien to all logic of constitutional rights that it is shocking and revolting to the conscience of all civilized societies BECAUSE IT IS A LEGAL RULE WHICH PUNISHES THE INNOCENT VICTIM OF WRONGDOING INSTEAD OF THE KNOWLEDGABLE WRONGDOER.

V. CONCLUSION

This case presents issues of comprehensive and fundamental constitutional rights of all citizens of the United States and urgently requires plenary review by this Court in view of the facts indicated herein that (i) the Fourth Circuit Court of Appeals has rendered a decision in conflict with another Court of Appeals (Fifth Circuit); (ii) in conflict also with an important question of federal law which has not been, but should be, settled

by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court; and (iii) which decision has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

FOR THE MANY REASONS STATED HEREIN, the Court should, and is requested to grant a writ of certiorari in this case.

* * * * * * *

Because the constitutionality of an Act of Congress is drawn into question herein, and 28 U.S.C. #2403(a) may be applicable, a copy of this Petition is also served on the Solicitor General, Department of Justice, Washington, D.C. 20530.

Respectfully,

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, VA 24011

Attorney for Petitioners

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

OPHUS A. HUTCHERSON, JR. et al
Petitioner,

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA et al
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE FOURTH JUDICIAL CIRCUIT

APPENDIX

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Telephone: (703) 345-0946

Counsel for Petitioners

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UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 82-2109

OPHUS A. HUTCHERSON, JR.,
W. H. HOUSEMAN, A. W. LYNCH,
BRUCE HIGGINS, O. K. TENCH,
KENNETH D. CAMPBELL, ALLEN PERDUE,
JAMES BOUSEMAN, JACKSON JEWELL,
J. CARL POINDEXTER, who sue on
behalf of themselves and all
others similarly situated

Appellants

and

A. DALE BROWN, RICHARD O. ANGLE,
HAROLD E. PALMER, PAUL SMITH,
JOSEPH FORDHAM, ROGER FLOWERS,
DICK ROBERTSON,

Plaintiffs

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA:
TOWN OF ROCKY MOUNT, VIRGINIA,

Appellees

Appeal from the United States District Court
for the Western District of Virginia, at
Roanoke. Jackson L. Kiser, District Judge.
C/A 82-0377

Argued December 7, 1983 Decided August 23, 1984

Before WIDENER and HALL, Circuit Judges, and HOFFMAN, Senior District Judge*

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*United States District Court for the Eastern District of Virginia, sitting by designation.

WIDENER, Circuit Judge:

In July 1980, the Board of Supervisors of Franklin County, Virginia levied a utility tax upon its citizens pursuant to Va. Code #58-617.2.[1] Plaintiffs, in May of 1982, filed this action in the United States District Court for the Western District of

---

[1] Va. Code #58-617.2 then provided in pertinent part (1982 and 1984 amendments do not affect this case):

> Any city or town or county may impose a tax on the consumers of the utility service or services provided by any corporation coming within the provisions of this article ...
>
> Any county, city or town may impose a tax on the consumers of services provided within its jurisdiction by any electric light and power, water or gas company owned by another municipality; ... Any county tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or hereafter imposes a town tax on consumers of utility service or services ...

Virginia challenging the validity of that tax. The district court dismissed the action and awarded attorneys' fees to the defendants, Board of Supervisors of Franklin County, Virginia (County) and Town of Rocky Mount (Town). Plaintiffs appeal, and we affirm.

The Town of Rocky Mount, Virginia is located within Franklin County, Virginia. Under Virginia law, towns such as Rocky Mount may levy taxes within their jurisdiction for purposes of funding the town's government, in addition to those taxes levied by the county. See, for example, Va. Code #58-844, 845. The Town of Rocky Mount has for several years levied a utility tax upon its residents for the purposes of the Town. Franklin County recently levied its own utility tax pursuant to Va. Code #58-617.2. Consistent with the terms of the statute, Franklin County could not collect its utility tax from its residents who reside in the Town of Rocky Mount since the Town already imposed a utility tax.

Plaintiffs challenged the constitutionality of #58-617.2 because County residents were required to pay the County utility tax while Town residents were not. They submit that the County utility tax was used to help support the County school system, and that, since both County and Town residents use the County's school system (the town does not have a separate school system), the Town residents should be required to pay the County utility tax.[2]

Plaintiffs sought a declaratory judgment from the district court that the County utility tax enacted under #58-617.2 discriminated against County residents in violation of the

---

[2]While there is some discussion that the County enacted the utility tax to provide revenue for a short fall in the school system's budget, the parties acknowledge that the tax is not earmarked by statute. Thus it may be used for general County purposes

Constitution because the Town residents using the county schools were not taxed by the County. They also sought a mandatory injunction requiring that Town residents be required to pay the County utility tax. Finally, they sought damages equal to the difference between the amount of utility taxes actually paid and the lower amount that would have been paid had Town residents been required to pay the County tax in addition to their own.[3]

The Town and the County moved to dismiss the complaint on the grounds that such action was barred by the Tax Anti-Injunction Act, 28 U.S.C. #1341, and that in any event a cause of action was not stated. The district court dismissed the case without opinion.

---

[3]We think the suggestion that the federal Constitution requires the Town to earmark its utility tax for school purposes, when this is not required by state law, is simply frivolous. The same may be said of the request for imposition of the County tax within the Town, contrary to the positive provisions of state law.

The Tax Anti-Injunction Act, 28 U.S.C. #1341, provides that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Supreme Court has consistently construed #1341 to drastically limit federal court intervention into state tax matters. Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981). We have given that statute a similar construction. Strescon Ind. v. Cohen, 664 F 2d 929 (4th Cir. 1981). The statute in terms forbids injunctions and the Court has specifically held that #1341 bars federal suits seeking declaratory relief so long as a plain, speedy and efficient state remedy exists. California v. Grace Brethren Church, 457 U.S. 393, 408 (1982). The principles of comity bar federal courts from

considering suits for damages under 42 U.S.C. #1983 challenging a state tax, providing adequate state remedies exist. Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100 (1981).

Clearly, plaintiffs are barred from seeking federal court review if Virginia provides them a plain, speedy and efficient state court remedy. The state remedy must meet certain minimal procedural criteria. Rosewell, supra, at 512. It is a plain, speedy and efficient remedy if it "provides the taxpayer with a 'full hearing and judicial determination' at which ... the taxpayer may raise any and all constitutional objections to the tax." Id. at 514, 515 n. 19, quoting LaSalle National Bank v. County of Cook, 57 Ill. 2d 318, 324, 312 N.E. 2d 252, 255-6 (1974). In Rosewell the Court approved a state court remedy that required a taxpayer to pay the tax under protest and then seek a refund, although if the taxpayer ultimately

prevailed the tax was refunded but no interest was paid.

A review of the remedies provided under Virginia law convinces us that plaintiffs have a plain, speedy and efficient remedy. In a departure from the general rule, it has been well settled in Virginia for years that the collection of an illegal tax may be enjoined at the instance of an individual taxpayer by a court of equity unless there is an adequate remedy at law. See Commonwealth v. Tredegar Co., 122 Va. 506, 95 S.E. 279 (1918); City of Staunton v. Mary Baldwin Seminary, 39 S.E. 596 (Va. 1901). The remedy at law is made available under Virginia Code #58-1145 and similar statutes. See Chapter 21, Article 2 of Title 58 of the 1950 Virginia Code. The relief, of course, granted by a court of equity is complete relief, and the relief granted under the Code is not confined to correction of erroneous assessments, Todd v. County of Elizabeth City, 191 Va. 52, 60

S.E. 2d 23 (1950), but also includes those claimed to be unconstitutional, illegal and void. Chesapeake and Potomac Tel. Co. v. City of Newport News, 194 Va. 409, 73 S.E. 2d 394 (1952). The statutes are to be liberally construed in order to further the remedy provided, and their object is to furnish an "expeditious and inexpensive remedy against taxes which have been assessed or collected." 73 S.E. 2d at p. 397. While the Virginia Court's broad reading of the statutes on the correction of illegal or erroneous assessment or collection of taxes leads us to believe there is some chance that suit under Va. Code #58-1145 might be entertained, although the problem complained of here is not precisely mentioned in #1145, should it not be, it is certain that a bill in equity in the Virginia courts would lie to correct the complaint of the plaintiffs. And even if a bill in equity were erroneously brought, stating plaintiffs' complaint, and

an adequate remedy at law were found to exist, see Va. Code #58-1158, then the case would not be dismissed but would be transferred to the law side of the docket. Chesapeake and Potomac Tel. Co., at 73 S.E. 2d 399.

We are thus of opinion that Virginia offers plaintiffs in her courts the opportunity for a plain, speedy and efficient remedy within the meaning of 28 U.S.C. #1341.

Plaintiffs next challenge the award of attorneys' fees to the Town and the County as prevailing parties under 42 U.S.C. #1988. Such fees are allowable in the court's discretion when a suit is unreasonable, frivolous, or meritless within the meaning of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

When plaintiffs initiated this action, the law was settled both by statute and decision that a federal court could not entertain such a suit for injunctive relief unless no plain, speedy and efficient state court remedy existed. McNary precluded a suit for

damages. Any doubt that an action for discretionary declaratory relief could be maintained after Great Lakes Bridge & Dock Co. v. Hoffman, 319 U.S. 393 (1943), was dispelled one month after the complaint was filed in this case by the Supreme Court in Grace Brethren Church which decided that declaratory relief was simply not available because of 28 U.S.C. #1341. Following that decision, however, the plaintiffs amended their complaint to ask for more, rather than less, declaratory relief. And so the case was when it came on for hearing.

In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that plaintiffs' suit is meritless within the meaning of Christiansburg Garment Co., in that it is unreasonable or groundless and that the plaintiffs continued to litigate

after it clearly became so. Christiansburg Garment Co., at 422.

The district court, having found that plaintiffs' action was frivolous as a matter of fact and law, was ever so careful in its assessment of attorneys' fees. It required affidavits showing literal item by item compliance with the twelve criteria established in this circuit in Barber v. Kimbrell's Inc., 577F 2d 216, 226, note 28 (4th Cir. 1978).

We are thus of opinion the district court did not abuse its discretion either in the award of attorneys' fees or in the amount thereof.

The judgment of the district court is accordingly

AFFIRMED[4]

[4]The Seventh Circuit has affirmed the award of attorneys' fees in a similar case. Werch v. City of Berlin, 673 F. 2d 192 (7th Cir. 1982).

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 82-2109

OPHUS A. HUTCHERSON, JR., et al

Appellants

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA et al

Appellees

O R D E R

There have been two petitions for rehearing filed in this case, one for the appellants by their attorney, the other by J. Carl Poindexter, pro se, each of which suggested rehearing en banc.

The petition for rehearing filed by appellants' attorney was timely filed, while the petition filed by Poindexter was out of time. Although the Poindexter petition was filed out of time, we are of opinion to, and

do, consider the same on its merits, and it is accordingly ORDERED that the Poindexter petition shall be, and it hereby is, permitted to be filed.

There having been no request for a poll of the court, it is according ADJUDGED and ORDERED that the petitions for rehearing en banc shall be, and they hereby are, denied.

The panel has considered the petitions for rehearing and is of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions for rehearing shall be, and they hereby are, denied.

With the concurrence of Judge Hall and Judge Hoffman.

_____

For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

OPHUS A. HUTCHERSON, JR., ET AL. Plaintiffs v. BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA: and TOWN OF ROCKY MOUNT, VIRGINIA Defendants	Civil Action No. 82-0377-R MEMORANDUM OPINION AND ORDER By: Jackson L. Kiser, Judge United States District Court

On November 3, 1982, I entered an Order dismissing the Plaintiff's Complaint. On November 15, 1982, and on November 16, 1982, the Defendants, Town of Rocky Mount and Board of Supervisors of Franklin County, respectively, moved the Court to allow attorneys' fees pursuant to 42 U.S.C. #1988. Subsequently, the Plaintiff Poindexter, on December 2, 1982, filed a Notice of Appeal. Thereafter, on Dec. 20, 1982, the remaining Plaintiffs moved the Court for an extension of time in which to file their Notice of Appeal. On December 9, a hearing was held at which time the Defendant Town of

Rocky Mount suggested that the Court was without jurisdiction to consider the matter of attorneys' fees because the appeal taken by the Plaintiff Poindexter had ousted the Court of jurisdiction citing as its authority the Fourth Circuit case of Wright v. Jackson, 522 F. 2d 955 (4th Cir. 1975). I did not consider the merits of the request for attorneys' fees, but took under consideration the issue of whether this Court had jurisdiction to award attorneys' fees.

The Supreme Court has recently considered the question of attorneys' fees under 42 U.S.C. #1988 in the case of White v. New Hampshire Department of Employment Security, Slip Opinion No. 80-5887 (March 2, 1982), and based on that opinion I conclude that this Court did not lose jurisdiction to consider the matter of attorneys' fees. Thus, I shall consider the issue of attorneys' fees.

For a defendant to recover attorneys' fees under 42 U.S.C. #1988, the court must find: (1) that the defendant was the prevailing party; and (2) that the plaintiff's action was frivolous, unreasonable or without foundation. There is no question that in this case the Defendants were clearly the prevailing parties. The only remaining question is whether the Plaintiff's action was "frivolous, unreasonable or without foundation." I find as a matter of fact and as a matter of law that the Plaintiff's action was frivolous. Unlike Christiansburg Garment Company v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), this case was not one of first impression. The anti-injunction statute has long been on the books and has been definitively interpreted by the United States Supreme Court. Any fair reading of the statute and the Supreme Court cases interpreting it clearly instructs that a United States District Court may not enter-

tain an action which in any way challenges the state's levying and collecting of taxes where the state provides a speedy and efficient procedure for challenging such actions. Virginia clearly provides such a procedure. Accordingly, I find that the Defendants are entitled to attorneys' fees, but that does not end the inquiry.

The Fourth Circuit has established twelve criteria for fixing attorneys' fees. Barber v. Kimbrell's, Inc., 577 F 2d 216, 226, fn. 28 (4th Cir. 1978). They are:

1. The amount of time spent on the case.

2. Whether the case was novel or difficult;

3. The degree of skill required to properly perform the representation;

4. Whether the attorney lost an opportunity for other business;

5. The customary fee for trial work of a similar nature;

6. The attorney's expectations at the

outset of the litigation;

7. Time limitations imposed upon the attorney by the client or circumstances;

8. The seriousness of the subject matter of the controversy and the result obtained;

9. The experience, reputation and ability of the attorney;

10. Whether the attorney was representing an unpopular cause which may have incurred the hard feelings of the public toward him;

11. Whether an attorney/client relationship existed between the attorney and his client prior to the case; and

12. Attorney fee awards in similar cases.

Counsel for the Defendants have previously submitted to the Court affidavits as to the amount of time they spent on the case and as to their hourly charges. However, there is no evidence in the record as to the remaining criteria. It is, therefore, ORDERED that the counsel for the Defendants submit to the

Court, in affidavit form, the remaining required information.

The Clerk is directed to send certified copies of this Memorandum Opinion and Order to all counsel of record.

ENTER this 10th day of January, 1983.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

OPHUS A. HUTCHERSON, JR., ET AL)) Plaintiffs)) v.)) BOARD OF SUPERVISORS OF) FRANKLIN COUNTY, VIRGINIA, and) TOWN OF ROCKY MOUNT, VIRGINIA)) Defendants)	Civil Action No. 82-0377-R ORDER

This matter came on again for the Court to consider the Plaintiffs' Motion for Reconsideration of the Court's Order of January 10, 1983, awarding attorneys' fees to Defendants' counsel. The Motion for Reconsideration is hereby denied.

At the direction of the Court, counsel for Franklin County and the Town of Rocky Mount have submitted affidavits touching on the twelve points set forth in the Court's Order of January 10, 1983. Based on those affidavits and upon the Court's empirical knowledge of

the charges, rates and customs of attorneys in the Western District of Virginia, I hereby find the following:

A. As to counsel for the Town of Rocky Mount -- Mr. Greer:

1. The amount of time spent by him on the case was 45-1/2 hours out of Court and 1 hour in Court.

2. As my earlier opinion indicated, the case was not novel nor was the presentation of the points of law difficult.

3. The skill required of the attorney was that of a competent, experienced lawyer but did not require specialized expertise.

4. The attorney lost no opportunity for other business.

5. The customary range of attorneys' fees for experienced trial attorneys in the Western District of Virginia ranges from $60.00 per hour to $85.00 per hour for out-of-court work and from $100.00 per hour to

$150.00 per hour for in-court work.

6. The attorney expected the client to pay his usual and customary charge.

7. There were no special constraints imposed upon the attorney by the client or circumstances.

8. The subject matter of the case was most serious. Had the Plaintiffs prevailed, the decision would have been most disruptive to established tax procedures in the Commonwealth of Virginia between municipalities and counties and would have had a disruptive effect on their financial planning.

9. The attorney is a highly experienced, very able and well-reputed attorney.

10. The cause which was being litigated was not an unpopular cause or one which would hold the attorney up to public scorn.

11. An attorney-client relationship did exist between the attorney and the client prior to the case.

12. Attorney fee awards in "civil rights" type cases in the Western District of Virginia have generally been based on the foregoing eleven criteria and do vary based on that criteria with the major consideration being time expended and rate of pay.

B. Counsel for Franklin County -- Mr. Rakes:

1. Amount of time spent (no distinction is made between in-court and out-of-court time in the affidavit) by Mr. Rakes was 14-1/2 hours and 4-1/2 hours by an associate.

2. As to Items 2 through 10 and Item 12, I make the same findings as I made with regard to counsel for Rocky Mount.

3. As to Item 11, I find that no prior attorney-client relationship existed between Mr. Rakes and Franklin County.

Based on the foregoing findings, I award counsel for the Town of Rocky Mount a fee

based on an out-of-court rate of $75.00 per hour x 45-1/2 hours which equals $3,412.50, and an in-court rate of $100.00 per hour which equals $100.00 for a total attorney's fee of $3,512.50.

As to counsel for Franklin County, since there is no distinction as to in-court and out-of-court work, I will award a fee for Mr. Rakes' work at a rate of $75.00 per hour for 14-1/2 hours which equals $1,087.50 and for the associate's work at the rate of $50.00 per hour for 4-1/2 hours which equals $225.00 for a total attorneys' fee of $1,312.50.

Associate counsel for Franklin County, Bruce E. Welch of Davis, Davis and Welch, was shown on the original bill of costs submitted by Franklin County as claiming $686.25 in attorney's fees. However, no affidavit has been submitted by Mr. Welch and, therefore, the Court is not in a position to fix attorney's fees for Mr. Welch.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Enter this 1st day of April, 1983.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

OPHUS A. HUTCHERSON, JR., ET AL, Plaintiffs v. BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA and TOWN OF ROCKY MOUNT, VIRGINIA, Defendants	)	Civil Action No. 82-0377-R ORDER

Both Defendants, Board of Supervisors of Franklin County, Virginia, and Town of Rocky Mount, Virginia, have filed Motions to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. After due consideration of the briefs and the arguments of counsel, the Court is of the opinion that the Motions are well taken, and it is, therefore, ADJUDGED and ORDERED that the Plaintiffs' Complaint be and is hereby DISMISSED and this action shall be and hereby is dismissed from the active

docket of the Court.

The Clerk is directed to send certified copies of this Order to all counsel and to Dr. J. Carl Poindexter.

ENTER this 3rd day of November, 1982.

United States District Judge

CONSTITUTIONAL PROVISIONS

Amendment I

"Congress shall make no law ... abridging the ... right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V

"No person shall be ... deprived of life, liberty, or property, without due process of law ..."

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

28 U.S.C. 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution and laws, or treatises of the United States.

28 U.S.C. 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. 2403(a):

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General ...

28 U.S.C. 2101(c):

Any ... writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. 1988:

In any action or proceeding to enforce a provision of 42 U.S.C. 1983 ... the district court may, in its discretion, allow a reasonable attorney's fee as part of costs to the prevailing party other than the United States.

56-617.2, Code of Virginia of 1950 as amended:

Any county (utility) tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or hereafter imposes a town tax on consumers of utility services ..., provided that such town (1) provides police or fire protection, and water of sewer services ...

58-1145

In such proceeding (to correct an erroneous assessment) the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal ...